PERKINSCOIE Steptoe

Pebble Limited Partnership
Request for Reconsideration on Compensatory Mitigation

August 10, 2020

I. Introduction

The USACE Alaska District recently informed Pebble Limited Partnership (PLP) that the District has preliminarily determined that the Pebble Project will require more onerous compensatory mitigation due to impacts on waters of the US in the Upper Koktuli watershed. The District stated that the Pebble Project would have "more than a trivial" impact for a preponderance of the 404(b)(1) factors in that watershed. The District stated this in turn triggers more onerous mitigation than would otherwise be required for the project, including a significantly higher mitigation ratio and a narrower geographic scope for mitigation options (limited to the upper or middle Koktuli watersheds). However, this determination runs counter to the record on this Project, the 404 regulations, and District precedent. Moreover, imposing extreme compensatory mitigation requirements would create uncertainty for future projects in Alaska. For the reasons stated below, PLP hereby requests that the USACE reconsider its preliminary finding regarding compensatory mitigation requirements for the Pebble Project.

II. "More Than Trivial" Is Not the Standard for Assessing the 404(b)(1) Factors

The District stated that the Pebble Project would have "more than a trivial" impact for a preponderance of the 404(b)(1) factors in the Upper Koktuli watershed, which triggers a requirement for more rigorous compensatory mitigation. But "more than trivial" is not the correct threshold for evaluating the 404(b)(1) factors.

The USACE Guidelines on Analysis of 404 Permit Applications provides that each 404(b)(1) factor should be evaluated on a continuum that includes no effect, negligible, minor, and "major (significant)" effect.[1] "More than trivial" is not one of the choices, but most closely equates to negligible or minor, with significant or "major" effects at the other end of the spectrum. "Significant" is not defined in the CWA or the 404 regulations, but the term cannot be reasonably read as "more than trivial" in this context. The common definition of "significant" is "having or likely to have a major effect."[2]

The USACE guidance on 404(b)(1) Alternatives Requirements provides "small discharges to construct individual driveways" as an example of an activity that would constitute "trivial impacts."[3] This underscores that "trivial impacts" means extremely minor or negligible

[1] Guidelines For Preparation Of Analysis Of Section 404 Permit Applications Pursuant To The Section 404(B)(1) Guidelines, https://www.sas.usace.army.mil/Portals/61/docs/regulatory/IP_SAS_404_b_1_Guidelines.pdf
[2] American Heritage Dictionary of the English Language, Fifth Edition (2011).
[3] EPA/USACE Memorandum on Appropriate Level of Analysis Required for Evaluating Compliance with the CWA Section 404(b)(1) Guidelines Alternatives Requirement, https://www.epa.gov/cwa-404/memorandum-appropriate-level-analysis-required-evaluating-compliance-cwa-section-404b1.

impacts. Thus, the phrase "more than trivial impacts" covers a huge continuum between trivial impacts like those from discharges from individual driveways and major or "significant" adverse impacts. Put simply, the fact that a project's impacts are more than trivial does not mean they are significant, or that they require additional or more restrictive compensatory mitigation.

Indeed, if "more than trivial" were the standard, almost every project that required an individual 404 permit would trigger extreme compensatory mitigation requirements. Under Section 404(e), the USACE can issue general permits to authorize activities that have minimal adverse environmental effects. In other words, once the USACE has decided an individual permit is needed, it has already determined that the impacts of the project are more than minimal, or "more than trivial."

Neither the statute nor the 404(b)(1) guidelines contemplate that a discharge with "more than trivial" impacts would be subject to more rigorous compensatory mitigation requirements. Instead, the USACE should evaluate the 404(b)(1) factors on a continuum from negligible to significant impacts. And as discussed more fully below, the record in this case demonstrates that the impacts in the Upper Koktuli do not rise to a level that trigger "significant" 404(b)(1) findings or more restrictive mitigation requirements.

III. The District's Proposed Finding regarding Impacts in the Koktuli Watershed Would Be Inconsistent With the Record Developed for the Pebble Project

The District listed several 404(b)(1) factors as supporting a finding that impacts in the Upper Koktuli watershed require more rigorous compensatory mitigation. However, the record does not support a finding of significant impacts in the Koktuli watershed for the 404(b)(1) factors listed by the District, as the following examples demonstrate.

Fish (§ 230.31). One of the 404(b)(1) factors cited by the District was impacts to fish, but the FEIS does not find significant impacts to fish or fish habitat in the Upper Koktuli:

> Mine site development would permanently remove approximately 22 miles of fish habitat in the North Fork Koktuli and South Fork Koktuli drainages. *The loss of habitat is not expected to have a measurable impact on fish populations based on physical habitat characteristics and fish density estimates in the affected reaches.* Sec. 4.24 (emphasis added).

Recreational and Commercial Fisheries (§ 230.51). The District also referenced Recreational and Commercial fisheries, but the FEIS did not find significant impacts in the Upper Koktuli:

> Impacts from the mine site would be the same across all alternatives. The mine site would result in loss of fish habitat in the upper North and South Fork Koktuli rivers. This disturbance would not be expected to have measurable effects on the number of adult salmon returning to the Nushagak and Kvichak district (see

> Section 4.24, Fish Values). The mine site area is not connected to the Togiak, Ugashik, Naknek, and Egegik watersheds and is not expected to affect fish populations or harvests from these watersheds. The mine site is not expected to affect Cook Inlet commercial fisheries. FEIS at Table 4.6-1.

Water-Related Recreation (§ 230.52). Another factor cited by the District was water-related recreation impacts, but the FEIS found recreation impacts from the mine site to be insignificant:

> 4.5.3.1 Mine Site Recreational use at the mine site is estimated to be low; use consists of some sport hunting, sport fishing, and occasional snowmachining.
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> The acres directly impacted do not see much recreational use and the magnitude of impacts would be measured by the small number of users that would be displaced to other nearby state or federal lands where similar recreation opportunities and settings exist.
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> …the mine site and immediate surrounding area is not popular for sport hunting, fishing, and other recreation uses, and potential users would be displaced to other state lands in the area with similar habitat.
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> The mine site would be approximately 15 miles from the border of Lake Clark National Park and Preserve, the nearest well-known regional recreation destination and use area to the mine site. Project-related noise and activities would not result in meaningful, direct effects on recreational settings or activities in the park unit. The geographic extent of the impact of the coarse ore stockpile at the mine site would be limited because it would only be visible from high elevations in the southwestern corner of the park near Roadhouse Mountain, which is a small portion of the total park unit (see Section 4.11, Aesthetics, and figures in Appendix K4.11). Visibility from this distance would be low; therefore, the magnitude of impacts to recreation settings and experiences

The District referred to recreation impacts at the Diamond Point Port in Iliamna Bay. However, any such impacts are outside the Koktuli watershed. Moreover, the FEIS does not identify significant recreation impacts at the Diamond Point Port. The FEIS, Section 4.5.5.3.provides:

> The construction of the Diamond Point port would result in the direct loss of 113 acres of area that is currently partially available for recreation, including 72 acres of wetlands and other waters. However, there are already some industrial activities occurring in the area; some authorized fill has already been placed for the Diamond Point Quarry project. Therefore, the magnitude and extent of recreational impacts in Cook Inlet would be less under

> Alternative 2 than Alternative 1a. The loss of recreational area would be permanent and would be certain to occur if the Diamond Point port is permitted and built.
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> Geographic extent of effects would be *limited to a relatively small portion* of Cook Inlet. There are nearby alternate locations where such recreational activities could occur; therefore, *impacts would be low magnitude* but would be long term, lasting for the life of the project and would occur if the Diamond Point port is permitted and built.
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> The Alaska Maritime National Wildlife Refuge is the only designated recreation area where the port site, including construction, operations, and closure activities, would be visible. …However, because the Alaska Maritime National Wildlife Refuge would be approximately 13 miles from the port, magnitude of impacts would be low and geographic extent limited to portions of the refuge with views toward the port.

Suspended Particulates (§ 230.21). The District also listed suspended particulates as one of the factors relevant to the finding. However, the FEIS indicates that such impacts at the mine site would be limited to the capture zone and thus would be treated prior to discharge:

> Concentrations of metals in shallow groundwater may also increase because of the disruption of wetlands and increased sedimentation, resulting in an increase in suspended particulates with adsorbed metals. If these effects on groundwater conditions were to occur, the effects would be in the groundwater capture zone of the open pit, and all impacted water would be treated prior to discharge to the environment. FEIS, p. 4.18-27.

Municipal and Private Water Supplies (§ 230.50). The District cited municipal and private water supplies, but the FEIS does not identify any impacts on drinking water, much less significant effects. The FEIS provides that "no mine site effects on drinking water wells are expected" (Table 4.18-1), and that no effect would be expected on drinking water sources outside the mine site area:

> **Effects on Drinking Water Wells and Drinking Water Sources**—Groundwater is abundant in the project area, and would be used as a source of potable water for the mine facilities. The water supply wells would be sited on a groundwater high upgradient and on the northern (i.e., opposite) side of the NFK east and north drainages that contain seepage collection systems for the pyritic TSF and main WMP (see Figure 4.16-1). *Therefore, groundwater that would be potentially affected by mine site*

> *facilities would not be expected to affect drinking water sources used by on-site workers. Similarly, no effect would be expected on drinking water sources outside of the mine site area.* The nearest water systems used by communities outside of the mine site are about 15 to 20 miles away from the groundwater capture zones at the mine site facilities. Impacts to surface water that serves as potential drinking water sources to local communities in the Bristol Bay region would not be expected due to capture, containment, and treatment of groundwater at the mine site. FEIS, p. 4.18-27 (emphasis added).

The District also mentioned that a TSF failure could impact water supplies. However, the USACE has found that the risk of a catastrophic TSF release is too insignificant to be reasonably considered under the CWA. In the FEIS, the USACE reviewed estimates of the probability of tailings dam failures, which range from one failure for every 714 dam-years to 250,000 dam-years. The FEIS explains why the proposed Pebble design significantly reduces the risk of these types of failures.[4] As discussed in the FEIS, the tailings storage facilities that have been shown to be the most robust and resistant to failure are those that have periodic technical review by qualified engineers throughout the lifetime, including after closure. The Alaska Dam Safety Program (ADSP) would require this periodic technical review throughout the life of the proposed facility. Thus, the already low risk of dam failure would be further reduced by the safety measures that will be in place for the Project. After evaluating the design of each embankment, and assessing the likelihood of a wide range of potential failure modes, the probability of a full breach of the bulk or pyritic TSF tailings embankments was assessed to be extremely low, and therefore was too remote to be assessed in the FEIS.[5] Any attempt to base compensatory mitigation requirements on a TSF failure would directly contradict these conclusions in the EIS.

In sum, the significant record developed by the USACE on the Pebble project does not support a finding of significant impacts in the Upper Koktuli and using such a determination to drive unprecedented compensatory mitigation requirements for the Project would be indefensible.

IV. Using Preliminary 404(b)(1) Findings to Trigger More Onerous Compensatory Mitigation Requirements Would be Inconsistent with USACE Precedent

There have been numerous major projects with significant impacts that received 404 permits without a requiring extreme compensatory mitigation requirements, including the recently issued Alaska LNG permit decision.[6] The District's consistent practice has been to address the 404(b)(1) factors in the ROD or permit decision, rather than issuing preliminary findings during the permitting process to drive up the compensatory mitigation requirements. The District's proposed approach of using preliminary 404(b)(1) findings to increase the compensatory mitigation ratio required and restrict the watershed scope available for mitigation

[4] FEIS § 4.27.8.6, Risk Assessment for the Proposed Embankments.
[5] *Id.* at p. 4.27 -104.
[6] Alaska LNG Project (June 2020). We understand that the ROD was issued for the Alaska LNG project on June 24, 2020, but the ROD has not yet been made publicly available.

opportunities would be unprecedented and run counter to the compensatory mitigation policy established for Alaska.

The following are examples of how the District addressed the 404(b)(1) factors for other major projects in Alaska without imposing undue restrictions on compensatory mitigation:

Ambler Road (2020).[7] For the Ambler Road project, EPA designated the Kobuk River and Nutuvukti fen as Aquatic Resources of National Importance (ARNIs). The total project elements requested under the February 5, 2020 application include the discharge of fill for the road, 15 material sites and access roads, 4 maintenance stations, 12 communication towers, 3 air landing strips, and a fiber optic cable. The project would permanently fill 1,431 acres of wetlands and 0.5 acre of open water with 8,460,218 cubic yards fill material. Approximately 250,435 linear feet of stream channel would be permanently impacted. The proposed project would also temporarily impact 333.6 acres of wetlands and 0.1 acre of open water with about 50,190 cubic yards of fill material, and indirectly impacts 17,187 acres of wetlands due to dust deposition. Approximately 110.5 acres of the permanent impacts to wetlands would be within the Kobuk Preserve, Gates of the Arctic National Park and Preserve.

The USACE found that cumulative effects of the construction of the road would result in impacts to less than 5% of the total area within each of the twenty HUC 10 watersheds the project crosses. The USACE therefore determined that mitigation in the forms of avoidance and minimization is sufficient, and compensatory mitigation is not required for the Ambler Road project.

Alaska Stand-Alone Pipeline (ASAP) (2019).[8] The District's assessment of compliance with the 404(b)(1) factors for ASAP (Appendix I2) evaluates impacts using terms such as "moderate" or "low" or "minor", thus recognizing the continuum of impact levels below "significant." Even though some impacts were found to be "moderate," and thus above trivial, the District did not impose undue restrictions on the compensatory mitigation for the ASAP Project. For the CMP, AGDC identified Cape Halkett for PRM preservation, even though Cape falls outside the 12-, 10-, and 8-digit HUCs of ASAP impacts. The District nonetheless found that the preservation at Cape Halkett would "fall within the ubiquitous North Slope wetlands complex and is available for preservation, and meets the objectives of preserving western ACP wetlands functions that are under threat from development. This approach is consistent with USACE/EPA joint guidance (USACE/EPA 2018) regarding mitigation for impacts to wetland areas in Alaska."[9]

Greater Moose's Tooth #2 (GMT-2) (Joint USACE/BLM ROD 2018).[10] The ROD for GMT-2 evaluates the "nature and degree" of the effects under each 404(b)(1)

[7] https://eplanning.blm.gov/public_projects/57323/200091317/20022329/250028533/Ambler%20Road%20Record%20of%20Decision.pdf

[8] http://www.asapeis.com/documents/ASAPJointRecordofDecision.pdf

[9] http://www.asapeis.com/documents/ASAPJRODAppendices.pdf

[10] Greater Moose's Tooth Two Development Project; Supplemental Environmental Impact Statement for the Alpine Satellite Development Plan; Joint Record of Decision and Permit Evaluation with the U.S. Army Corps of Engineers

factor. The describes the nature of impacts and then concludes that based on consideration of special conditions and mitigation, there is "compliance" with the guideline. The USACE determined that mitigation in the form of avoidance and minimization measures were sufficient and that no compensatory mitigation was required for the project. Nonetheless, the applicant requested the USACE include, as a special condition to the permit, a project to help restore stream flow at an existing culvert bank located south of the City of Nuiqsut.[11]

Donlin Gold (August 2018).[12] In Donlin, the USACE required compensatory mitigation for permanent loss of 2,877 acres of wetlands, 3 acres of fill below the ordinary high water mark of the Kuskokwim River, and 175,316 linear feet of streams. Donlin's CMP includes purchasing 9.8 released credits from an In-Lieu fee provider, restoring 92.95 acres of wetlands, 8,982 linear feet of streams, 16.8 acres of riparian buffer and preserving a total of 3,425.75 acres of wetlands and 271,074 linear feet of streams and 2,243.9 acres of riparian buffer.[13]

Greater Moose's Tooth #1 (GMT-1) (2015). The District's evaluation of the 404(b)(1) factors in GMT-1 emphasized the special conditions and the applicant's mitigative measures to conclude that the discharge would be "in compliance" with each relevant guideline.[14] The CMP plan included off site PRM preservation of 342 acres to mitigate for 72 acres of direct impacts, or roughly a 5:1 mitigation ratio (less if indirect impacts are accounted for).

Point Thomson (2012).[15] For the Point Thomson project, the District found that impacts would range "from minor and temporary" to "major and long term," but that "none of the impacts identified would cause or contribute to significant degradation of WOUS." The CMP required a total of 1,115.6 credits to be purchased from an ILF, based on a 3:1 ratio.

The above examples demonstrate that the USACE's consistent approach is to evaluate the 404(b)(1) factors on a continuum from negligible to significant impacts, rather than a "more than trivial" impacts standard. In addition, the District consistently allows out of watershed mitigation where in-watershed mitigation is not practicable, and uses ratios around 5:1 or lower. In fact, we could identify no examples where the applicant was limited to a very narrowly defined watershed, or was required to use extreme ratios, as the District has proposed for Pebble. Using a preliminary finding on the 404(b)(1) factors to impose unreasonably restrictive mitigation requirements would thus be entirely inconsistent with District practice and policy. As

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October 2018; available at https://eplanning.blm.gov/projects/nepa/65817/160123/195768/Record_of_Decision_with_cover_page.pdf

[11] Greater Mooses Tooth Two Development Project; Supplemental Environmental Impact Statement for the Alpine Satellite Development Plan; Joint Record of Decision and Permit Evaluation with the U.S. Army Corps of Engineers October 2018.

[12] https://www.donlingold.com/wp-content/uploads/2018/08/Donlin-Gold-Corps-BLM-Joint-Record-of-Decision.pdf.

[13] https://www.donlingold.com/wp-content/uploads/2018/08/Donlin-Gold-Corps-BLM-Joint-Record-of-Decision.pdf

[14] POA-2013-461 ROD at 53.

[15] https://www.poa.usace.army.mil/Portals/34/docs/regulatory/PtThomsonRODOct2012.pdf(p. 106-107).

discussed more fully below, it also flies in the face of the guidelines established by EPA and the USACE for compensatory mitigation in Alaska.

V. Imposing a More Stringent Standard in this Case Would Set a Precedent that Would Undermine Future Permits in Alaska

EPA, USACE and Alaska's congressional delegation have for decades stressed that 404 permitting requirements must be applied flexibly in Alaska in recognition of the abundant, and largely intact, aquatic resources of the state. For example, the 2018 MOA between EPA and the USACE, and the decades of Alaska-specific policies that preceded it, specifically recognize that mitigation requirements must be applied flexibly in Alaska given the abundance of wetlands:

> Given the unique climatological and physiographic circumstances found in Alaska, it is appropriate to apply the inherent flexibility provided by the guidelines to proposed projects in Alaska. Applying this flexibility in a reasoned, commonsense approach will lead to effective decision-making and sound environmental protection in Alaska.[16]

The MOA recognizes guiding principles that are specific to Alaska, including:

- Compensatory mitigation options over a larger watershed scale may be appropriate given that compensation options are frequently limited at a smaller watershed scale;
- Out-of-kind compensatory mitigation may be appropriate when it better serves the aquatic resource needs of the watershed.[17]

The long-standing policy of flexibility in Alaska is based on the fact that Alaska has abundant wetlands in a largely untouched status, and therefore represents a very different permitting scenario than the lower 48. Any effort to move away from the flexibility allowed under the 2018 Alaska MOA and to impose a more stringent standard on the Pebble project would set a dangerous precedent that could be used against other development projects in Alaska.

The members of Alaska's congressional delegation have for years stressed that the requirements for wetlands protections must be applied flexibly in Alaska. For example, Senator Dan Sullivan said in 2018:

> When the Lower 48 were being developed, they didn't need to deal with today's onerous regulatory restrictions. I am encouraged to see EPA and the Army Corps recognizing these issues. I hope we can continue to work together to set up a practical regulatory structure that protects our watersheds and cleans up existing

[16] 2018 Memorandum of Agreement Between the US Environmental Protection Agency and the Department of the Army Concerning Mitigation Sequence for Wetlands in Alaska under Section 404 of the Clean Water Act.
[17] MOA, p. 2-3.

> environmental problems, while allowing us to build the projects we need to build in Alaska.[18]

Similarly, Senator Murkowski has long emphasized the need for regulatory flexibility in order to ensure the feasibility of reasonable development in Alaska:

> We here in Alaska are keenly aware of the challenges that current regulatory practices impose. …Approximately 43 percent of our state is categorized as wetlands. … how the Federal Government chooses to approach those rules has a big impact on our daily lives and our ability to grow as a state.[19]

It was because of these concerns, and the unique conditions of Alaska, that the Alaska-specific policies were developed, including the 2018 Alaska MOA. Any effort to argue that the flexibility allowed under these policies should not apply to projects like Pebble would reverse years of work by the delegation, the USACE and EPA to ensure a reasonable path forward for future development projects in Alaska.

Almost all major development in Alaska requires a 404 permit because of the abundant jurisdictional waters throughout the state. For example, the ANWR DEIS recognized the scope of CWA jurisdiction in that region: "Most of the land cover types in the program area are likely to be jurisdictional wetlands subject to permitting under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act." BLM ANWR DEIS, p. 3-69. Many of the activities associated with oil and natural gas production and distribution include impacts to aquatic resources that require authorization from the USACE prior to initiating work, including construction of utility lines, roadways, pipelines, well pads, water impoundments, and intake and outfall structures. Thus, most future development in Alaska will require 404 permits, and the application of the 404(b)(1) factors.

In sum, the challenges regarding 404 permitting in Alaska are in no way unique to the Pebble Project, or even the Bristol Bay Region. If the Pebble Project is held to a stricter standard on compensatory mitigation, or the District sets a precedent that more than trivial impacts trigger a need for more onerous compensatory mitigation, this will set a precedent for preventing development throughout the state.

VI. Conclusion

The District's "more than trivial" test has no basis in the regulations or USACE precedent. In addition, a finding of significance regarding the 404 factors in the Upper Koktuli watershed is not supported by the record for this project. Such a finding also flies in the face of Alaska District precedent, where numerous large projects have been permitted without imposing extreme in-watershed mitigation requirements. Imposing onerous compensatory mitigation requirements in this case would set a dangerous precedent that could be used against future

[18] https://www.alaskajournal.com/2018-07-11/one-final-acts-epa-pruitt-updates-alaska-wetlands-management.
[19] Federal Mitigation Requirements And Interagency Coordination, Joint Field Hearing, Senate Committee On Energy And Natural Resources (August 17, 2015,Wasilla, Ak).

development throughout Alaska. Finally, such a finding would be inconsistent with multiple directives from the Trump Administration to streamline permitting and reduce unnecessary delays. For example, President Trump's June 4, 2020 Executive Order directs federal agencies to "take all reasonable measures to speed infrastructure investments and to speed other actions in addition to such investments that will strengthen the economy and return Americans to work."[20] The EO specifically includes USACE permitting under the CWA. By imposing extreme compensatory mitigation requirements, the District is unduly complicating the permitting process, contrary to White House streamlining directives.

PLP therefore requests that the District focus on compensatory mitigation for the Project that is consistent with District precedent and the flexibility long-recognized as necessary in Alaska. PLP has demonstrated its willingness to work with the District on a robust CMP that includes mitigation in the Koktuli watershed. However, the District should not impose unprecedented mitigation ratios or unduly restrict the scope of the watershed available for mitigation. Moreover, when the District addresses the 404(b)(1) factors in the final permit decision, it should follow its standard practice of using a continuum for each factor (e.g., impacts are low, medium, or significant), rather than a "more than trivial" standard.

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[20] Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities; Issued June 4, 2020.